Supreme Court, U.S.
FILED

96 419 SEP 13 1996

OFFICE OF THE CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1996

LEE JETER BROCK, Guardian Ad Litem for ELIZABETH H.HARDY, a minor, and LEE JETER BROCK, Individually,

Petitioners,

v.

FORREST RAY LEWIS, JAN LEWIS and LUCY LEWIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Henry L. Anderson, Jr., Esquire
ANDERSON, DANIEL & COXE
Post Office Box 1309
Wrightsville Beach, NC 28480
Telephone: (910) 256-6896
Attorneys for Petitioners

QUESTIONS PRESENTED

I. Whether the District Court for the Eastern District of North Carolina and the Fourth Circuit Court of Appeals impermissibly substituted facts not in evidence in deciding to dismiss this action for lack of subject matter jurisdiction?

II. Whether the Court of Appeals for the Fourth Circuit erred in holding that Petitioner's attempt to board a vessel being operated in a navigable waterway was not a traditional maritime activity?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CASES AND AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF FACTS 2

ARGUMENT..... 3

I. THIS ACTION SHOULD NOT BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE FACTS AS ALLEGED ARE SUFFICIENT TO SUPPORT A CLAIM SOUNDING IN ADMIRALTY 3

II. BY PUTTING ITSELF IN THE IMPROPER POSITION OF FINDER OF FACT, THE COURT OF APPEALS INAPPROPRIATELY HELD THAT THE PETITIONER'S ATTEMPT TO BOARD THE VESSEL WAS NOT A TRADITIONAL MARITIME ACTIVITY 6

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982) 3

Butler v. American Trawler Co.,Inc., 707 F. Supp. 29 (D. Me. 1989) 8

Chapman v. City of Grosse Point Farms, 305 F.2d 962 (6th Cir. 1967) 7,8

Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80 (1957) 5

Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493 (1972) 5

Jerome B. Grubart, Inc. v. Great Lakes Dredge and Dock Co., __ U.S. __, 130L.Ed. 2d 1024, 115 S.Ct. 1043 (1995)..... 6,7

Price v. Price,929 F.2d 131 (4th Cir. 1991)..... 8

Sisson v. Ruby, 497 U.S. 358, 111 L.Ed.2d 292 (1990) 8

Tullis v. Fidelity and Casualty Co. of New York, 397 F.2d 22 (5th Cir. 1968) 8

Statutes

United States Constitution, Article III, 2 6

Federal Rules of Civil Procedure
Rule 9(h) 1
Rule 12(b)(1) 4,5

North Carolina General Statutes 75A-5 2

STATEMENT OF THE CASE

This case is a claim for relief brought by the Plaintiffs against the Defendants on March 27, 1995 submitted in the District Court. (App. 3,5,11). The Plaintiffs brought their complaint against the Defendants alleging the Defendants were negligent and were responsible for the Plaintiff's injuries. (App. 13,15). Plaintiffs asserted that the District Court's jurisdiction was based on federal admiralty jurisdiction under Rule 9(h) of the Federal Rules of Civil Procedure. (App. 12). The Defendants did not answer the complaint and moved to dismiss the complaint for lack of subject matter jurisdiction on or about May 4, 1995. (App. 6,19). The Plaintiffs filed a Substitute/Amended Complaint on May 23, 1995 to add Lucy Lewis as a named party defendant. (App. 6,22). The District Court permitted the Plaintiff's Amended Complaint on June 5, 1995. (App. 7). On June 8, 1995, the Defendants moved to dismiss the complaint for lack of subject matter jurisdiction. (App. 8,33). The District Court ordered the complaint dismissed and issued its judgment on June 19, 1995. (App. 8,36). The Plaintiffs appealed the judgment on June 23, 1995. The United States Court of Appeals for the Fourth Circuit heard oral arguments on March 7, 1996. The Fourth Circuit handed down its per curiam decision affirming the District Court's dismissal of the action on May 24, 1996. (App. 51) The Plaintiffs filed a petition for rehearing on June 7, 1996 (App. 57), which the Court denied on June 18, 1996. (App. 69). The Plaintiffs now appeal the judgment of the appellate court. The Supreme Court has jurisdiction pursuant to Article III, § 2 of the United States Constitution.

STATEMENT OF FACTS

The Plaintiff, Elizabeth H. Hardy, was an invited guest at the floating dock of the defendants on August 19, 1994. (App. 12,23). The defendants' home is located on the Intracoastal Waterway. (App. 11,23). The defendants are the owners of the house, "its surrounding land and a pier with an attached floating dock which led into and serviced the Intracoastal Waterway." (App. 12,23). The Plaintiff, Elizabeth H. Hardy, came to the defendants' floating dock by navigating a WaveRunner on the Intracoastal Waterway to the defendants' floating dock. (App. 12,24). Said WaveRunner is duly registered under the boat registration laws of North Carolina pursuant to North Carolina General Statute 75A-5. The boat registration number is NC-8475 CG. The plaintiff then docked the WaveRunner and secured same to the floating dock. The defendant, Lucy Lewis, soon after boarded the WaveRunner and navigated it into the Intracoastal Waterway. After a short while the defendant, Lucy Lewis, commanded the plaintiff to dive into the Intracoastal Waterway and board the WaveRunner. (App. 13, 24). The plaintiff, pursuant to the command of the defendant, then dove into the Intracoastal Waterway from the floating dock. (App. 13,24). At the time, the depth of the waterway surrounding the floating dock was only twelve inches deep. (App. 12,23). The plaintiff was rendered quadriplegic as a result of the injury she sustained from the dive. (App. 13,24).

ARGUMENT

This case is subject to *de novo* review.

I. THIS ACTION SHOULD NOT BE DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE THE FACTS AS ALLEGED ARE SUFFICIENT TO SUPPORT A CLAIM SOUNDING IN ADMIRALTY

> "There are two critically different ways in which to present a motion to dismiss for lack of subject matter jurisdiction. First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based. In that event, all the facts alleged in the complaint are assumed to be true..."

Adams v. Bain, 697 F.2d 1213 (4th Cir. 1982).

The petitioners in this case have alleged in their complaint that Elizabeth Hardy dove into the Intracoastal Waterway at the command of the respondent, Lucy Lewis, to board the vessel piloted by Lewis on the Intracoastal Waterway. (App. 13,24). Accepting this set of facts as true, there is sufficient evidence to support a claim sounding in admiralty. However, in the order of the District Court for the Eastern District of North Carolina, the Honorable James C. Fox presiding, the court found that Elizabeth Hardy was not engaged in an act of boarding but rather in "child's play" (App. 46). On appeal to the Fourth Circuit Court of Appeals, the appellate court found that the petitioner Elizabeth Hardy was engaged in "recreational swimming and diving" (App. 55), in direct contradiction of the facts alleged by the petitioners in their complaint.

By arriving at a decision based on its own set of facts, the district court erred in dismissing the action based on a 12(b)(1) motion. The Fourth Circuit perpetuated this error by affirming the district court's version of the facts on appeal. By doing so, both lower courts put themselves in the improper position of finder of fact. The only facts which should have been considered were the ones alleged in the complaint, which clearly stated that Elizabeth's fateful dive was made in response to Lewis' command to board the WaveRunner.

The set of facts which should have been the basis for the decision whether to dismiss for lack of subject matter jurisdiction clearly show that Elizabeth dove off that pier for one purpose only - to board the vessel as she was commanded to do by Lucy Lewis. Before that fateful dive, she had not been engaged in recreational swimming and diving. Instead, she had been sunbathing while Lucy Lewis piloted the WaveRunner in the Intracoastal Waterway. Elizabeth did not dive into the waterway in response to a command by the respondent to dive in and do some recreational swimming. Rather, the command was to board the WaveRunner. The only way to do so was to get off the pier and swim to the vessel, which was out in the waterway due to the negligent navigation of the vessel by Lewis. Finally, Elizabeth, did not spontaneously decide to do some recreational swimming and diving. The facts which the petitioners have alleged indicate that had it not been for the command of the respondent, Elizabeth would not have attempted to enter the water for recreational purposes. However, when she heard the respondent's command to board the vessel, she attempted to comply in the only way possible - by entering the water and swimming out to the vessel. Although Elizabeth never completed that swim due to her injury, it is clear that the purpose of the swim was not recreational, but was instead an attempt to board the vessel being piloted by the respondent, Lucy Lewis.

The foregoing set of facts is the only set which should have been considered by the lower courts. By improperly basing its decision on the district court's finding of facts, the Court of Appeals clearly overlooked the law with regard to dismissals of claims for want of subject matter jurisdiction. The Supreme Court has held that a motion to dismiss an action for want of subject matter jurisdiction may be granted only if it appears beyond doubt that the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. Conley v. Gibson, 355 U.S. 41, 2 L.Ed.2d 80 (1957). In the case at bar, the plaintiffs have offered sufficient facts to support their contention that Elizabeth dove into the water in order to board the WaveRunner. (App. 13, 24). In fact, the 12(b)(1) motion made by the respondents/defendants was a pre-answer motion; so far in this case, no answer has been made, and the only facts in the case are those alleged by the petitioners/plaintiffs. (App. 6-19). Although the respondents will no doubt dispute these facts at some point, that dispute is for the trier of fact to decide. The relevant issue for the district court, rather, is whether it is *beyond doubt* that the plaintiff can prove no set of facts which would entitle her to relief. In this case, based solely on the complaint, it is certainly not beyond doubt that the petitioners might be able to prove that Elizabeth made her unfortunate dive in an attempt to board the vessel being piloted by the respondent Lucy Lewis. If doubt exists as to the purpose of Elizabeth's dive, then by definition the issue cannot be "beyond doubt". That doubt should be resolved by a trier of fact, not by the district court in deciding a pre-answer motion. For the District Court to hold that it is "absurd" (App. 46) to believe that Elizabeth's plan to board the WaveRunner was in no way connected to a traditional maritime activity was an improper finding of fact which resulted in an erroneous conclusion of law.

II. BY PUTTING ITSELF IN THE IMPROPER POSITION OF FINDER OF FACT, THE COURT OF APPEALS INAPPROPRIATELY HELD THAT PETITIONER'S ATTEMPT TO BOARD THE VESSEL WAS NOT A TRADITIONAL MARITIME ACTIVITY

Article III, Section 2 of the United States Constitution provides federal jurisdiction over admiralty and maritime law. U.S. Const., art. III, section 2. Though admiralty jurisdiction originally applied to any wrong located on navigable waters, the United States Supreme Court refined this standard over the last two decades. In Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 34 L.Ed.2d 454, 93 S.Ct. 493 (1972), the Court found, in the context of an airplane crashing in navigable waters, "it is far more consistent with the history and purpose of admiralty to require also that the wrong bear a significant relationship to traditional maritime activity." Id., at 467. The Court most recently confirmed its standard for admiralty jurisdiction in Jerome B. Grubart Inc. v. Great Lakes Dredge and Dock Co., ___ U.S. ___, 130 L.Ed.2d 1024, 115 S.Ct. 1043 (1995). The Court stated:

> [A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 USC 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must 'assess the general features of the type of incident involved' to determine whether the incident has 'a potentially disruptive impact on maritime

> commerce.' Second a court must determine whether 'the general character' of the 'activity giving rise to the incident' shows a 'substantial relationship to traditional maritime activity.' Id. at 1035. (citations omitted).

In the case at bar, the Plaintiff sustained her injury within the navigable waters of the Intracoastal Waterway. As the district court accurately described: "courts have had little difficulty finding that injuries sustained when a plaintiff is injured upon navigable waters are sufficient to meet the 'locality' test." (App. 43) (citations omitted). The district court also correctly found "for purposes of determining the 'locality' of a tort in this context, it is not the place where the negligent act occurred that is important; IT IS THE PLACE OF INJURY THAT CONTROLS." (App. 43 (emphasis supplied). In favor of this point, the district court cites Chapman v. City of Grosse Point Farms, 305 F.2d 962 (6th Cir. 1967) where the Sixth Circuit Court of Appeals found the location prong to be satisfied for a claimant that dove off a pier into 18 inches of water and injured himself. Referring to the claimant's injury, the court said "the 'substance and consummation' of the alleged tort here did not occur upon the dock, and this case is therefore governed by the authorities which hold that A TORT IS DEEMED TO OCCUR AT THE PLACE WHERE INJURY IS SUSTAINED, REGARDLESS OF THE PLACE OF ORIGIN OF THE NEGLIGENT ACT." Id., at 965 (emphasis supplied).

The Plaintiff in the case at bar was injured in navigable waters - specifically the navigable waters of the IntraCoastal Waterway. After diving into the IntraCoastal Waterway as a result of the negligence of the Defendants, the Plaintiff hit her head on the bottom and was subsequently rendered quadriplegic. It is self-evident that

the "substance and consummation" of the Plaintiff's injury occurred in navigable waters. And, since "a tort is deemed to occur at the place where injury is sustained, regardless of the place of origin of the negligent act," the locality test is clearly satisfied in the case at bar. Chapman, at 965.

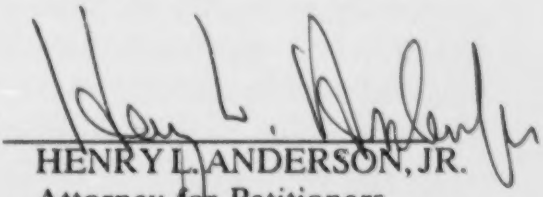
The facts of this case also show that the Plaintiff has satisfied not only the navigable waters prong of the locality test, but also the "traditional maritime activity" prong as well. By focusing on the "general character of the activity", Sisson v. Ruby, 497 U.S. 358, 111 L.Ed.2d 292, 301 (1990), several other courts have found that boarding is a traditional maritime activity. See, for example, Price v. Price, 929 F.2d 131 (4th Cir. 1991) (disembarking a vessel was related to an activity that was traditionally maritime); Butler v. American Trawler Co., Inc., 707 F.Supp. 29 (D. Me. 1989) ("When negligence causes injury during the boarding of a vessel...the resulting cause of action sounds in admiralty..."); and Tullis v. Fidelity and Casualty Co. of New York, 397 F.2d 22 (5th Cir. 1968) (failure to provide safe means for disembarking is tort which sounds in admiralty). Clearly, boarding constitutes a traditional maritime activity. Because boarding is a traditional maritime activity which in its generality could effect navigational trade and commerce on navigable waters, the second prong of the Executive Jet test is satisfied. Based on the facts found in the Plaintiff's complaint, which, as stated above, are the only facts to be considered in this case, Elizabeth Hardy was rendered quadriplegic when she dove into a navigable waterway in order to board a vessel. Therefore, because Elizabeth was injured in a navigable waterway while engaging in a traditional maritime activity, the two-prong locality test is satisfied and admiralty jurisdiction applies.

CONCLUSION

The district court and the Court of Appeals both erred in deciding the case based on facts not contained in the record. By substituting their own version of the facts, the lower courts erred in finding that the Petitioner's act of boarding the vessel in navigable waters was not a traditional maritime activity. The Supreme Court of the United States should grant the petitioner's writ of certiorari and hold that, based upon the only facts in the case, Petitioner was engaged in a traditional maritime activity in navigable waters, and that therefore admiralty jurisdiction should apply. In the alternative, the Supreme Court should grant the Petitioner's writ of certiorari and remand the case to the district court for a proper determination of jurisdiction based solely upon the facts as set forth in the original complaint.

Respectfully submitted,

ANDERSON, DANIEL & COXE

BY: 

HENRY L. ANDERSON, JR.
Attorney for Petitioners
527 Causeway Drive
Post Office Box 1309
Wrightsville Beach, NC 28480
Telephone (910) 256-6896